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INAI OFFSHORE & MARINE ENGINEERING SDN BHD

v.

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ABDUL JALAL KHALID

HIGH COURT MALAYA, KUALA LUMPUR
MAH WENG KWAI JC
[ORIGINATING SUMMONSES NO: D-24NCC-48-2010
& D-24NCC-50-2010]
C 18 AUGUST 2010

COMPANY LAW: *Winding-up - Recovery of payments - Liquidator claiming for return of payments made to directors of company - Whether payments void having been paid after commencement of winding-up* D *proceedings - Whether directors having right to be paid in preference over other creditors - Whether payments validated by court - Companies Act 1965, s. 219(2), 223 - Rules of the High Court 1980, O. 88 - Companies (Winding-Up) Rules 1972, r. 66*

E In these two originating summonses heard together before the court, the plaintiff company through its court appointed liquidator, sought for a declaration that the payments of RM528,350.78 and RM8,330,000 made to the defendants respectively were void and in contravention of s. 223 of the Companies Act 1965 ('the Act'). F The liquidator also sought for orders for the return of the impugned payments. The defendants who were the directors of the plaintiff and signatories of the plaintiff's bank account with Al-Rajhi Bank were claimed to have been unlawfully paid the impugned payments after the commencement of the plaintiff's winding-up proceedings. The liquidator also sought repayment of G a sum of RM12,300 owing by the defendant to the plaintiff in originating summons no. D-24NCC-48-2010.

Held (allowing the originating summonses):

H **(1)** Pursuant to s. 219(2) of the Act, the winding-up of a company was deemed to have commenced upon the presentation of the winding-up petition (*Kredin Sdn Bhd v. Development of Commercial Bank Bhd* (CA); foll). In this case, the petition to wind-up the plaintiff was filed by a creditor on I 29 June 2009 and as such the plaintiff's winding-up was deemed to have commenced on that date. The impugned

payments were made on 18 and 19 August 2009, *ie*, after the commencement of the winding-up proceedings. Under s. 223 of the Act, the payments were void having been made after the presentation of the winding-up petition unless they were validated by the court (*Kimoyama Elektrik (M) Sdn Bhd v. Metrobilt Construction Sdn Bhd;* refd). (para 10)

(2) It was the duty of the liquidator to realise and preserve the plaintiff's assets for the benefit of both secured and unsecured creditors including the defendants and employees of the plaintiff. The intent and scope of s. 223 of the Act was to prevent the disposal or dissipation of a company's assets or properties between the date of the presentation of the petition and the date of the winding-up order. Although the defendants contended that part of the impugned payments were made for the benefit of the plaintiff's employees and for an innocent third party who had no notice of the petition, it was found that such payments were not made as alleged but paid directly into the defendants' bank accounts. Further, the liquidator in these originating summonses had sought for the return of monies from the defendants themselves and not from the employees and the third party. That apart, the defendant in originating summons no. D-24NCC-48-2010 admitted and/or did not deny or dispute the sum of RM12,300 due and owing to the plaintiff. (para 10)

(3) The winding-up court would have satisfied itself that the service of the petition was proper before it made the decision to wind-up the plaintiff. Therefore, the defendants' contention that the winding-up order was invalid due to improper service could not be accepted. The defendants were also precluded by the doctrine of *res judicata* to challenge the validity of the winding-up order. Further, there was no appeal against the winding-up order but instead there was an application to set it aside which was dismissed. Although the plaintiff had appealed to the Court of Appeal, no stay order was granted pending the appeal. (para 10)

(4) Although part of the impugned payments were for overdue remuneration and back wages and as such the defendants were creditors of the plaintiff, it was trite that the defendants

as unsecured creditors had no right to be paid in priority to and in preference over other creditors. (para 10)

(5) The petition having been duly advertised and gazetted, the defendants as directors and contributories of the plaintiff were deemed to have had notice of the petition. The defendants having notice of the petition ought to have applied to the court for an order to validate the impugned payments to themselves, to their employees and the innocent third party. Having failed to do so, the impugned payments were *prima facie* void payments and the defendants could not, at this late stage, ask the court to validate them retrospectively. (para 10)

(6) The court had the discretion to decide on whether it should validate any payments made by the company before its liquidation. However, that discretion could only be exercised in certain circumstances, for example, where it was in the interest of creditors that the company's business should be carried on and where the payments were made in good faith in the ordinary course of business without notice that the petition had been filed. (para 10)

(7) The impugned payments should not be validated on the following grounds: (i) they were lacking in particulars (ii) the plaintiff had received a sum of RM11,721,061.25 on or about 16 August 2009 and although the plaintiff had ceased business, the defendants had emptied the plaintiff's bank account within the next 48 hours (iii) the plaintiff did not challenge or oppose the petition heard (iv) the impugned payments were not made in the course of business to pay the plaintiff's creditors but for the defendants' benefit and its employees (v) the impugned payments were largely used to pay the defendants themselves in preference over other creditors pending the hearing of the petition and (vi) the impugned payments were not made in good faith as the defendants ought to have been aware that the petition was presented and that the impugned payments were an attempt to prefer themselves over other creditors. Accordingly, the impugned payments were void and could not be validated retrospectively. (paras 10 & 11)

Case(s) referred to:
In re Gray's Inn Construction Co Ltd [1980] 1 WLR 711 ***(refd)***
Kimoyama Elektrik (M) Sdn Bhd v. Metrobilt Construction Sdn Bhd [1990] 2 CLJ 795; [1990] 2 CLJ (Rep) 253 HC ***(refd)***
Kredin Sdn Bhd v. Development & Commercial Bank Bhd [1995] 4 CLJ 18 CA ***(foll)***
Re Webb Electrical Ltd [1988] BCLC 382 ***(refd)***
Seruan Gemilang Makmur Sdn Bhd v. Badan Perhubungan UMNO Negeri Pahang Darul Makmur [2009] 1 LNS 1457 HC ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 219(2), 223
Companies (Winding-Up) Rules 1972, r. 66

Companies Act 1948 [UK], s. 227

For the plaintiff - Prakash Lachimanan; M/s Mathews Hun Lachimanan
For the defendant - Zaidi Abd Hamid; M/s Zaidi Hamid & Partners

Reported by Usha Thiagarajah

JUDGMENT

Mah Weng Kwai JC:

[1] By Originating Summons No: D-24NCC-48-2010 dated 19 February 2010 (encl. 1) the plaintiff, through its court appointed liquidator, sought a declaration that the sum of RM528,350.75 paid out from the plaintiff's account to the defendant, Abdul Jalal bin Khalid (the 1st defendant) is void and in contravention of s. 223 of the Companies Act 1965 (the Act) and that the 1st defendant be ordered to repay the said sum to the plaintiff. The plaintiff also sought an order that the 1st defendant pay the sum of RM12,300 being money due and owing to the plaintiff together with interests and costs.

[2] By Originating Summons No: D-24NCC-50-2010 dated 19 February 2010 (encl. 1) the plaintiff, through its court appointed liquidator, similarly sought a declaration that the sum of RM8,330,000 paid out from the plaintiff's account to the defendant, Abu Seyrey bin Maidin Sikh Alli (the 2nd defendant) is void and in contravention of s. 223 of the Act and that the 2nd defendant be ordered to repay the said sum to the plaintiff together with interests and costs.

[3] At all material times, the 1st and 2nd defendants were directors of the plaintiff.

[4] Both cases were fixed for hearing on 23 June 2010 and by consent of counsel for the parties it was agreed that the two applications be heard together. Counsel for the plaintiff and the defendants were the same in both cases. Accordingly, the grounds of judgment in respect of both applications will be dealt with together.

[5] Before commencement of the hearing of the applications, counsel for the defendants applied for a postponement to file a Further affidavit in reply to the plaintiff's affidavit in reply filed on 26 May 2010 (encl. 4). Considering that encl. 1 and the affidavit in support were served on counsel for the defendants on 22 April 2010 and that the defendants had filed their affidavit in reply on 10 May 2010 (encl. 3) and in view of the objection of counsel for the plaintiff, the postponement was not allowed as the defendants had been served with encl. 4 about four weeks earlier.

[6] Brief Facts Of The Case

(a) A winding up petition *vide* Kuala Lumpur High Court Case No: D1-28-482-2009 (the petition) was presented on 29 June 2009 to wind up the plaintiff.

(b) The petition was advertised in the New Straits Times and the Star newspapers on 13 August 2009, 14 August 2009, 19 August 2009, 28 August 2009 and gazetted in the Gazette on 27 August 2009.

(c) As the cause papers were in order, the court granted an order to wind up the plaintiff on 1 October 2009.

(d) The two originating summonses herein were filed by Mr Ng Pyak Yeow (the liquidator) as the court appointed liquidator of the plaintiff.

(e) The defendants were at all material times the signatories of the plaintiff's bank account with Al-Rajhi Bank *vide* Account No 12300-1080411923.

(f) The liquidator is seeking the return of the sum of RM528,350.75 and the sum of RM8,330,000 from the 1st defendant and the 2nd defendant respectively, being monies

unlawfully paid by the plaintiff to the 1st and 2nd defendants in breach of s. 223 of the Act, that is, after the commencement of the winding up proceedings on 29 June 2009.

(g) The liquidator is also seeking the repayment of the sum of RM12,300 from the 1st defendant as money due and owing by him to the plaintiff.

(h) Before the hearing of the petition on 1 October 2009, the 1st defendant together with the 2nd defendant as the directors of the plaintiff and as signatories of the plaintiff's bank account had caused the plaintiff to pay to the 1st defendant the sum of RM500,000 on 18 August 2009 and the sum of RM28,350.75 on 19 August 2009, thereby totaling RM528,350.75.

(i) Similarly, the 2nd defendant together with the 1st defendant as directors of the plaintiff and as signatories of the plaintiff's bank account had caused the plaintiff to pay to the 2nd defendant the sum of RM3,600,000 on 18 August 2009 and the sum of RM4,730,000 on 19 August 2009 thereby totaling RM8,330,000

(j) For ease of reference, the respective sums paid to the defendants are herein referred to as "the impugned payments".

(k) The liquidator had on various occasions requested the 1st defendant to return the sums of RM528,350.75 and RM12,300 to the plaintiff but the 1st defendant has refused and/or failed to do so. Instead, the 1st defendant informed the liquidator of his intention to set aside the winding-up order of 1 October 2009.

(l) Similarly, the liquidator had requested the 2nd defendant on various occasions to return the sum of RM8,330,000 to the plaintiff but the 2nd defendant has refused and/or failed to do so.

(m) The liquidator issued notices in form 33 pursuant to r. 66 of the Companies (Winding-Up) Rules 1972 on 14 January 2010 to the defendants to return the impugned payments to the plaintiff.

(n) The defendants did not obtain any order from court to validate the impugned payments.

(o) As at 19 February 2010, the liquidator had received proof of debts for the total sum of RM30,964,260.15 from six creditors of the plaintiff.

(p) On 30 April 2010 the defendants applied to set aside the winding up order of 1 October 2009. The application was dismissed by the court and on 4 May 2010, the plaintiff through the defendants filed an appeal against the dismissal of the application to set aside the winding up order to the Court of Appeal.

[7] The Plaintiff's Case

(a) The liquidator sought the return of the impugned payments pursuant to s. 223 of the Act on the ground that any payment by the plaintiff after winding-up proceedings had been commenced would be void.

(b) The petition to wind up the plaintiff was presented on 29 June 2009. The court granted the order to wind up the company on 1 October 2009.

(c) The defendants had on 18 August 2009 and 19 August 2009 made the impugned payments without an order of court.

The Defendants' Case

[8] Counsel for the defendants submitted that the defendants are not liable to repay the impugned payments on *inter alia* the following grounds:

(i) service of the petition was bad and defective and as the debt, allegedly owed to the petitioner Mint Mark Corp Sdn Bhd, was seriously disputed, the petition was defective in law.

(ii) the liquidator was not acting in the best interest of the plaintiff and had in fact acted with bias against the defendants.

(iii) the impugned payments made by the plaintiff to the defendants are valid as they were payments of overdue remuneration and back wages for the defendants themselves, to the employees of the plaintiff as overdue allowances and bonuses and to a *bona fide* innocent third party who had no notice of the petition.

Decision Of The Court

[9] Upon a consideration of the originating summonses, the affidavits filed by the parties and the submissions of both counsel, the court ordered that the defendants repay the impugned payments to the liquidator together with interest thereon at 4% per annum from 19 August 2009 to the date of payment and costs of RM4,000 in Originating Summons No: D-24NCC-48-2010 and the sum of RM7,500 in Originating Summons No: D-24NCC-50-2010 respectively.

[10] Reasons For The Decision

(a) Pursuant to s. 219(2) of the Act, the winding up of a company by the court is deemed to have commenced upon the presentation of the winding up petition.

In the case of *Kredin Sdn Bhd v. Development of Commercial Bank Bhd* [1995] 4 CLJ 18; [1995] 3 MLJ 304, Siti Norma Yaakob JCA (as she then was) sitting in the Court of Appeal held that:

> The intention of Parliament in enacting ss. 219(2) and 224 of the Act is to ensure that no creditors, particularly the unsecured creditors, who execute their claims against the company would be enriched at the expense of other unsecured creditors, between the date when the winding-up petition is presented and when the winding-up order is made by the court ('the interim period').

The Court of Appeal held that pursuant to s. 219(2) of the Act, a compulsory winding-up is deemed to commence at the time when the winding-up petition is presented.

(b) In this case the petition to wind up the plaintiff was filed by a creditor *vide* Kuala Lumpur High Court Case No: D1-28-482-2009 on 29 June 2009 and as such the winding up of the plaintiff is deemed to have commenced on that date.

(c) Section 223 of the Act provides:

> Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.

(d) The petition was duly advertised in two daily newspapers and gazetted in the Government Gazette as per the directions of the court.

(e) In this case the impugned payments were made by the defendants on 18 August 2009 and 19 August 2009 that is, after the commencement of the winding up proceedings.

(f) In the case of *Kimoyama Elektrik (M) Sdn Bhd v Metrobilt Construction Sdn Bhd* [1990] 2 CLJ 795; [1990] 2 CLJ (Rep) 253 Zakaria Yatim J held that under s. 223 of the Act the disposition of the payment of monies by the property of the company after a winding-up petition has been presented is void unless the court makes a validation order. The purpose of the section is to protect the interests of creditors when a petition for winding-up is presented.

(g) As the impugned payments were made by the defendants without an order of court, it is clear that the said payments are void and the defendants are legally obliged to return the impugned payments to the liquidator.

(h) It is the duty of the liquidator to realize and preserve the assets of the plaintiff for the benefit of creditors both secured and unsecured, including the defendants and employees of the plaintiff. It is obvious that the intent and scope of s. 223 of the Act is to prevent the disposal or dissipation of a company's assets or properties between the date of the presentation of the petition and the date of the winding up order.

(i) Although the defendants contended that part of the impugned payments were for the benefit of the employees of the plaintiff and for an innocent third party who had no notice of the petition, it is to be noted that this part of the impugned payments were not made to the employees and to the third party directly but paid into the bank accounts of the defendants separately. By these two originating summonses, the liquidator does not seek the return of monies from the employees and the third party but from the defendants themselves.

(j) The 1st defendant admitted and/or did not deny or dispute the sum of RM12,300 was due and owing to the plaintiff. See paras. 8.1 and 8.2 of the affidavit in reply affirmed by the 1st defendant on 7 May 2010 (encl. 3).

(k) The liquidator had issued notices in form 33 pursuant to r. 66 of the Companies (Winding Up) Rules 1972 to the defendants requesting for the return of the impugned payments on 14 January 2010. The defendants having received the said notices failed to respond to dispute the liquidator's request for the return of the impugned payments.

(l) The court cannot accept the contention by counsel for the defendants that as the petition was not properly served as alleged by the defendants the winding up order made on 1 October 2009 is invalid. The learned judge, Justice Nallini Pathmanathan sitting in the winding up court had obviously satisfied herself that the petition was in order before the court made the decision to wind up the plaintiff. The court would have satisfied itself that the service of the petition was proper. The plaintiff through its directors, the defendants, did not appeal against the order of winding up but instead applied to set aside the said order. The application to set aside was dismissed on 30 April 2010 by the learned Justice Nallini Pathmanathan and the plaintiff filed an appeal to the Court of Appeal. Up to the date of hearing of the originating summonses on 23 June 2010 there was no order granted to stay the order given on 30 April 2010 pending the appeal of the plaintiff to the Court of Appeal.

(m) As the issue of the service of the petition had been raised, considered and decided by the winding up court on 30 April 2010, the defendants are now precluded by the doctrine of *res judicata* to challenge the validity of the winding up order. An earlier decision had been made and this had resulted in a final judgment given by the court.

On the law of *res judicata* the learned judge, Justice VT Singham in the case of *Seruan Gemilang Makmur Sdn Bhd v. Badan Perhubungan UMNO Negeri Pahang Darul Makmur* [2009] 1 LNS 1457; [2010] 8 MLJ 57 at 68 had the occasion to say the following:

> In civil cases, a previous judgment or order is relevant when it is tendered in evidence in support of a plea of *res judicata* and which was a fact in issue: see *Ram Ranjan Chakerbati v. Ram Narain Singh* 22 C 533; 22 1A 60 (PC); *Dinomoni v. Broji Mohini* 29 C 187; 29 1A 24 (PC). It is in the interest of the public at large that there should be an end to litigation (*interest ripublicae ut sit finis litium*). In other words there should be finality to the binding decisions pronounced by courts of competent jurisdiction.

(n) The defendants had contended that part of the impugned payments were due to them as overdue remuneration and back wages and as such they are creditors of the plaintiff. However, it is trite that the defendants as unsecured creditors have no right to be paid in priority to and in preference over other creditors.

(o) The petition having been duly advertised and gazetted, the defendants as directors and contributories of the plaintiff are deemed to have had notice of the petition.

(p) The defendants having had notice that the petition had been presented, ought to have at least applied to the court for an order to validate the impugned payments to themselves, the employees of the plaintiff and the innocent third party. This the defendants did not do and as the impugned payments are *prima facie* void payments, the defendants cannot at this late stage ask the court to validate the impugned payments retrospectively.

In the case of *Kimoyama Elektrik (M) Sdn Bhd v. Metrobilt Construction Sdn Bhd (supra)* Zakaria Yatim J at p. 256 held:

> The question of validating a transaction is at the discretion of the Court but a person who seeks an order to validate a transaction must make an application for such an order. In the present case there is no such application. In any event even if there is an application, this is not a proper case for the Court to make such an order. If a validating order is made Fullmark would be paid a substantial sum of money at the expense of the other creditors.

(q) The court has a discretion to decide on whether it should validate any payments made by the company before its liquidation. However, this discretion can only be exercised in certain circumstances where it is in the interest of creditors

that the company's business should be carried on and where the payments were made in good faith in the ordinary course of business without notice that the petition had been filed.

Buckley LJ in the case of *In re Gray's Inn Construction Co Ltd* [1980] 1 WLR 711 at 718 held that a disposition carried out in good faith in the ordinary course of business at a time when the parties are unaware that a petition has been presented may, it seems, normally be validated by the court unless there is any ground for thinking that the transaction may involve an attempt to prefer the disponee, in which case the transaction would probably not be validated. The English Court of Appeal in the *Re Gray's Inn* case *(supra)* went on to hold that the court should exercise its discretion under s. 227 (of the English Companies Act 1948) in validating otherwise invalid dispositions in order to ensure that the interests of unprotected creditors would not be prejudiced.

(r) In this case the contention by the defendants that the impugned payments should be validated cannot be entertained for the following reasons:

(i) the impugned payments are lacking in particulars.

(ii) the plaintiff had received a sum of RM11,721,061.25 on or about 16 August 2009 and although the company had ceased business, the defendants emptied the company's bank account within the next 48 hours;

(iii) the plaintiff did not challenge or oppose the petition that was heard on 1 October 2009;

(iv) the impugned payments were not made in the course of ordinary business to pay the creditors of the plaintiff but allegedly were made for the benefit of the defendants and its employees;

(v) it is obvious that the impugned payments were used to largely pay the defendants themselves in preference of other creditors pending the hearing of the petition.

In the case of *Re Webb Electrical Ltd* [1988] BCLC 382 Herman J of the chancery division held that the court would only validate a payment made after the commencement of a winding up where it was made with a *bona fide* view to assisting the company.

A (vi) the impugned payments by the defendants were not made in good faith in the ordinary course of business of the plaintiff. The defendants were aware or ought to have been aware that the petition had been presented and that the impugned payments were an attempt to prefer themselves as the disponees over other creditors.

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[11] As I had held that the impugned payments were void and as I was not prepared to validate the payments retrospectively, an order in terms of the originating summonses was made accordingly.

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